MALAYAN UNION REPORT.

MUDA bin ZAINAL AND 2 OTHERS v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan C.J., Malayan Union, Murray Aynsley C.J., Singapore and Spenser Wilkinson, J.) March 27, 1947]

Penal Code, Sections 395 and 397 — Section 397 of the Penal Code is not intended to include gang-robbery and does not create a separate offence in conjunction with Section 395.

In this case the appellants were convicted of gang-robbery under Section 395 of the Penal Code. At the conclusion of the case for the prosecution, the learned trial Judge charged all three accused with a second charge under Section 397 of the Penal Code, the charge alleging that "while committing the said offence of gang-robbery" the accused were armed with deadly weapons. All three appellants were found guilty on the charge under Section 395 and also on the charge under Section 397 of the Penal Code but the learned trial Judge sentenced them only under Section 395 as he held that the two offences consisted of one and the same transaction and the punishment to which the accused were liable under Section 395 and Section 397 were similar.

Held, (1) that Section 397 of the Penal Code is not intended to include gang-robbery and does not create a separate offence in conjunction with Section 395; (2) that, therefore, the addition of the second charge was wrong, but that this did not in anyway prejudice the appellants in their defence against the main charge, which was gang-robbery.

Case referred to :—

(1) *Rex v. Yeo Kim Watt and another* (1946), 12 M.L.J. 155.

CRIMINAL APPEAL.

R. Ramani for the Appellants.

J. N. C. Kilner for the Respondent.

The judgment of the Court was delivered by :—

Spenser Wilkinson, J. : — The appellants in this case were convicted of gang-robbery under Section 395 of the Penal Code in respect of a robbery committed by them and others on the night of 20th to 21st July, 1946, at Kampong Bakong in Kelantan. When the trial commenced, there was a further charge against the third appellant for being armed with a deadly weapon at the time of committing the said gang-robbery, this charge being laid under section 397 of the Penal Code.

At the conclusion of the case for the prosecution, the learned trial Judge amended the second charge against the third appellant and added a charge against the first and second appellants, all three being charged with a second charge viz :—

> That you, at the time of committing the said offence of gang-robbery were armed with deadly weapons, to wit, large cutting knives, axes and a rifle and did thereby commit an offence punishable under section 397 of the Penal Code.

All three claimed trial on this new charge but did not desire to recall any of the prosecution witnesses, and proceeded to make their defence upon the two charges as they then stood.

At the conclusion of the case, all three appellants were found guilty on the charge under section 395 and also on the charge under section 397. The learned trial Judge sentenced each one of them to seven years' rigorous imprisonment and nine strokes of the rattan under section 395 of the Penal Code, but imposed no sentence in respect of the charge under section 397 "because the two offences consisted of one and the same transaction and the punishment to which the accused were liable under section 395 and section 397 were similar."

On the hearing of the appeal, it was argued on behalf of the appellants that the addition of a charge under section 397 that in "the said gang-robbery" they had used deadly weapons is not permissible in law because section 397 applies only to robbery. On behalf of the Public Prosecutor it was argued that section 397 applies because gang-robbery is merely an aggravated form of robbery committed by five or more persons.

It was decided by the Singapore Court of Criminal Appeal in the case of *Rex v. Yeo Kim Watt and another*[1] that section 397, when read with section 392 or section 393, creates separate and distinct offences from the offences prescribed by the last mentioned two sections, to the same extent that the offence of theft in any of the aggravating circumstances set out in section 382 is an offence different from theft under section 379. If the argument put forward by Crown Counsel in the present case is correct, it would follow that sections 395 and 397 would together create a new offence which might be described as aggravated gang-robbery. It is to be observed, however, that apart from sections 394 and 397 all the sections subsequent to section 391, which deal with robbery, specifically mention gang-robbery when that offence is intended. Section 392 clearly deals with robbery only; section 393 deals with attempted robbery; section 395 provides the punishment for gang-robbery; section 396 the punishment for gang-robbery with murder; section 399 (there is no section 398) deals with preparation in committing gang-robbery; section 400 punishes persons belonging to gangs associated for committing gang-robbery; section 401 deals with wandering gangs of thieves who are *not* gang-robbers; and section 402 punishes assembling for the purpose of committing gang-robbery.

But neither section 394 nor section 397 mentions gang-robbery, and the question arises whether the omission means that gang-robbery is excluded or whether it is intended to be included in the term "robbery". The punishment provided by section 395 includes both penal servitude for life and whipping with a cat-o'-nine tails. Once, therefore, a person is convicted under section 395, no purpose would be served by invoking either section 394 or section 397 because neither of these sections would increase the punishment in any way. There is, therefore, no purpose in including gang-robbery in either of these sections, and this is no doubt the reason why any reference to gang-robbery is omitted from these sections. Instances in the Penal Code where aggravating circumstances make a particular act a more serious offence than the same act without the aggravating circumstances are common, and if the legislature had intended to make gang-robbery with deadly weapons or gang-robbery accompanied by grievous hurt a separate offence, it is probable that they would have made this plain by including the expression "gang-robbery" in the section and providing some additional punishment.

In any event, it would not be right to frame two separate charges in a case of this kind, for there is only one offence. It would be wrong, for example, in the case of theft by a servant to charge the offender with separate charges under sections 379 and 381. Nor would there be any need to do so because if upon a charge under section 381 the prosecution failed to prove that the offender was a servant he could still be convicted under section 379. Similarly, in a case of armed robbery it is the usual practice to frame one charge in which it is stated that the accused is punishable under sections 392 and 397. If the prosecution fails to prove that the robber was armed, a conviction under section 392 only is recorded.

We are of opinion that section 397 is not intended to include gang-robbery and does not create a separate offence in conjunction with section 395. It follows that the addition of the second charge in this case was wrong, but we do not think that either the addition of this second charge or the fact that the second charge as drawn was unnecessarily wide in any way prejudiced the appellants in their defence against the main charge, which was gang-robbery. We see no reason to interfere in any way in the findings of fact of the learned trial Judge, and we have no doubt upon the evidence that all the accused were properly convicted on the charge of gang-robbery under section 395.

For the above reasons, the conviction under section 397 is quashed, whilst that under section 395 is affirmed and the sentence maintained.

Appeal Dismissed.

MOHAMED JUSOH bin ABDULLAH AND ANOTHER vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan C.J., Malayan Union, Murray Aynsley C.J., Singapore and Brown, J.) April 3, 1947]

Criminal Trial — Sentence — Matters which should be taken into account in fixing sentence.

In this case, the Court of Appeal stated that they did not agree with the principle stated in the case of **Chua Boon Hean v. Regina**(1) that a sentence for a first offender should in general be one third of the maximum sentence prescribed.

The Court held that no sentence can be assessed by a simple mathematical formula and said that many factors must be taken into account according to the circumstances of each individual case. They approved of the following statement of the law in **Halsbury's Laws of England**:— "The Court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character."

Case referred to :—

(1) *Chua Boon Hean v. Regina* (1888) 1 S.L.J. 64.

CRIMINAL APPEAL.

The judgment of the Court was delivered by :—

Willan, C. J. : — In this case the first appellant was convicted of forging a valuable security, to wit an agreement for the sale of land, an offence contrary to section 467 of the Penal Code. The second appellant was convicted of abetment, an offence contrary to sections 109 and 467 of the Penal Code.

An offence against section 467 is punishable with penal servitude for life, or with imprisonment of either description which may extend to ten years, and the offender is also liable to a fine. The punishment for abetment of an offence is the same as that prescribed for the offence abetted.

The learned trial Judge sentenced each of the appellants to three years rigorous imprisonment, and in his grounds of judgment stated that he did so following the principles for the punishment of first offenders laid down in the case of *Chua Boon Hean v. Regina*(1). In that case, which was an appeal against sentence imposed by a Magistrate, the Supreme Court of the Straits Settlements stated that the sentence for a first offender should in general be one-third of the maximum sentence prescribed.